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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HEATHER POINT PARTNERS NO. 4, L.P., et al.,

Plaintiffs and Appellants,

v.

COUNTY OF SANTA CRUZ et al.,

Defendants and Appellants,

PAUL CAMPBELL et al.,

Interveners and Appellants.

No. H036645
(Santa Cruz County
Super. Ct. No. CV161144)

Appellants County of Santa Cruz (the County), Paul and Carol Sue Campbell (the Campbells), and Manresa Alliance to Protect Coastal/Agricultural Land (MAPCAL) challenge the trial court's order granting the mandate petition of respondent Heather Point Partners[1] (Heather Point). The court compelled the County to issue four unconditional certificates of compliance (UCOC's) for four parcels owned by Heather Point. Appellants contend that Heather Point was not entitled to four UCOC's because

[1] Heather Point Partners is actually four entities: Heather Point Partners No. 1, L.P., Heather Point Partners No. 2, L.P., Heather Point Partners No. 3, L.P., and Heather Point Partners No. 4, L.P.

the four parcels were created by an illegal 1971 subdivision and were not entitled to the conclusive presumption of legality created by Government Code section 66412.6.[2]

Section 66412.6 provides: "For purposes of this division or of a local ordinance enacted pursuant thereto, any parcel created prior to March 4, 1972,[3] shall be conclusively presumed to have been lawfully created if the parcel resulted from a division of land in which fewer than five parcels were created and if at the time of the creation of the parcel, there was no local ordinance in effect which regulated divisions of land creating fewer than five parcels." (§ 66412.6, subd. (a); Stats. 1980, ch. 403, § 1.)

Heather Point cross-appeals and contests various aspects of the trial court's decision and its order denying its motion for attorney's fees under Code of Civil Procedure section 1021.5. We affirm the trial court's orders.

I. Factual Background

In 1970, a five-acre parcel, then known as parcel 22, was deeded to four couples: the Fogelstroms, the Williamsons, the Ahlmans, and the Potters. At that time, the five-acre parcel was improved with a single family dwelling that had been constructed prior to 1945. Each couple acquired a one-quarter undivided interest in parcel 22.

On December 20, 1971, the four couples jointly recorded four grant deeds subdividing the five-acre parcel into four separate parcels. Each of the deeds granted to one of the couples a separate parcel consisting of one portion of parcel 22. These four parcels were thereafter given separate assessor's parcel numbers (APN's). The smallest

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[2] Subsequent statutory references are to the Government Code unless otherwise specified.

[3] "March 4, 1972, is the effective date of legislation adding the requirement of a parcel map to the SMA [(Subdivision Map Act)] for divisions of land into four or fewer parcels." (*Fishback v. County of Ventura* (2005) 133 Cal.App.4th 896, 904 (*Fishback*).)

of these parcels, which was just over one acre, was the one that contained the single family dwelling.

At the time of the December 1971 deeds, Santa Cruz County's "Zoning Ordinance," which was contained in chapter 13.04 of the Santa Cruz County Code, included a "general provision[]" containing numerous subsections governing "SITE AREA, SITE WIDTH, SITE DEPTH, SITE FRONTAGE AND SITE COVERAGE." (Santa Cruz County Code, former §§ 13.04.400, 13.04.300, 13.04.300-d.) One subsection, which we will refer to as the "SITE AREA" provision, provided: "Where buildings or structures have been erected prior or subsequent to the effective date of this Chapter, the area on which such buildings or structures are erected shall not be subsequently *divided* so as to reduce the building site area[[4]] width, depth or frontage below the requirements of this Chapter for the type and zone location of the buildings or structures." (Santa Cruz County Code, former § 13.04.300-d, italics added.)

On December 21, 1971, the County's board of supervisors passed a subdivision ordinance regulating all land divisions into four parcels or fewer. This ordinance, which was contained in chapter 13.08 of the Santa Cruz County Code, took effect on January 21, 1972.

In July 1973, the Santa Cruz County Counsel sent a letter to the four couples informing them that the December 1971 transaction "did not comply with the zoning then in effect." "Any parcel division must be in conformance with the applicable zoning." "[T]he parcel will not be given legal recognition by the County of Santa Cruz." The letter "suggested that" the four couples "recombine" the four parcels "into the original parcel, as it existed prior to December 20, 1971."

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[4] See footnote 8 *post*.

In March 1978, the four couples recorded a single grant deed transferring all four parcels to BAT Development. BAT Development immediately transferred the four parcels to a couple named Meisser.

In 1981, the Legislature enacted section 66412.6 (the conclusive presumption statute). In 1988, the County enacted Santa Cruz County Code sections 14.01.108 and 14.01.109 (the parcel legality ordinances). The parcel legality ordinances provided that a parcel would be conclusively presumed to be lawfully created and would be entitled to an unconditional certificate of compliance if it was "created" by a division of fewer than five parcels on or before January 21, 1972.[5]

In 2001, the four parcels were transferred to a couple named Cartwright. The four parcels were transferred to Heather Point in 2003.

II. Administrative Proceedings

In August 2006, Heather Point applied to the County for four UCOC's for the four parcels. Heather Point claimed that the four parcels were entitled to the conclusive presumption of legality authorized by section 66412.6. The planning department decided that the four parcels were entitled to only one UCOC. In December 2006, Heather Point appealed the department's decision to the planning director. In February 2008, the planning director overturned the department's decision and granted the application for four UCOC's. Santa Cruz County Supervisor Ellen Pirie thereafter filed a request for special consideration of the application by the Santa Cruz County Board of Supervisors

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[5] This ordinance also provided that "[a] parcel shall not be deemed created if . . . [¶] . . . [¶] [a]s to divisions creating *five or more parcels*, the parcel did not meet the minimum parcel size of the zoning applicable to the property at the time such parcels were originally created." (Italics added.)

(the Board) under Santa Cruz County Code section 18.10.350.[6] Heather Point responded to Pirie's request by seeking a continuance of the hearing and noting that "[t]his is a complex legal decision which will need the Board's full consideration." The Board subsequently overturned the planning director's decision and decided that the four parcels were entitled to only one UCOC.

III. Trial Court Proceedings

In August 2008, Heather Point filed a mandate petition under Code of Civil Procedure section 1085 (traditional mandate) or alternatively Code of Civil Procedure section 1094.5 (administrative mandate). The petition sought an order to the County requiring it to issue four UCOC's to Heather Point for the four parcels. The petition alleged that Heather Point's property had been "lawfully divided into 4 separate legal parcels" in December 1971. Heather Point alleged that the four parcels were subject to a conclusive presumption of legality under section 66412.6, subdivision (a) because the four parcels had been created prior to March 4, 1972 and prior to the January 1972 operative date of the County's subdivision ordinance. In addition, the petition alleged that the decision of the Board was "contrary to law and in excess of its authority" because the decision of the planning director that the Board reviewed was not subject to review by the Board under the Santa Cruz County Code.

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[6] This section provides: "Various planning decisions have been delegated to the Planning Commission, the Zoning Administrator, the Planning Director, or other officers, subject to appeal procedures. In order to ensure the orderly and consistent application of this chapter in accordance with its intent, it is hereby provided that the Board of Supervisors shall consider and act on any such delegated matter which would otherwise be appealable, upon the request of any member of the Board of Supervisors, provided such a request, outlining the reasons why a special consideration of the matter is appropriate, is filed in writing with the Clerk of the Board within the time provided for filing an appeal." (Santa Cruz County Code, § 18.10.350.)

After the County had answered the petition, the Campbells, the Sierra Club, and MAPCAL sought leave to intervene in the action. The Campbells own a property that adjoins Heather Point's property and that is subject to an access easement in favor of Heather Point's property. Heather Point opposed intervention on the ground that the interveners' interest was "identical" to the County's and would be "adequately represented" by the County.

Heather Point filed a motion to disqualify the attorney for the prospective interveners and his law firm on the ground that the attorney, Jonathan Wittwer, had previously been an attorney for the County and had allegedly engaged in "confidential communications" with the County with regard to ordinances at issue in this proceeding. The County responded to this motion by filing a declaration from their attorney stating that he had investigated and determined that Wittwer did not have access to "confidential information unavailable to the general public which would give him any advantage against the County relevant to this particular matter."

The court granted the motion to intervene as to the Campbells and MAPCAL, but denied it as to the Sierra Club. It denied the motion to disqualify Wittwer and his law firm on the ground that there was "no conflict here" and no issue concerning confidential information because "the ultimate issue in this case is an issue of law as opposed to an issue of fact." However, the court ordered the County to create a privilege log as to any confidential items, which the court could then review in camera to determine whether the items were relevant and should be disclosed. Heather Point's attorney responded: "Your Honor, that resolution is acceptable to the Petitioner, and I think it's a fair resolution."

The court subsequently denied Heather Point's motion for disclosure of three confidential documents that had been prepared by Wittwer during his employment by the County. The court found that these documents "have no relevance" to the issues in this case. The court also later denied Heather Point's subsequent motion to augment the administrative record with one of these documents (which Heather Point had somehow

obtained). The court found that the document was not "relevant to the legal issue that I'm called upon to decide in the case."

On the merits, Heather Point argued that the fact that the 1971 subdivision of the parcel might have violated the "SITE AREA" provision did not affect the application of the conclusive presumption statute. The County argued that the violation of the "SITE AREA" provision meant that the conclusive presumption statute could not legalize the 1971 division of the parcel. Heather Point also argued that the County's parcel legality ordinances chose January 21, 1972 as the date when the County first regulated divisions of fewer than five parcels, so the County was bound by its finding that no applicable local subdivision ordinance previously existed. Thus, the "SITE AREA" provision could not be considered a "local ordinance" under the conclusive presumption statute.

In June 2010, the court made a tentative ruling that it was inclined to deny the petition. It reasoned that the 1971 deeds were invalid because they violated the "SITE AREA" provision. It also tentatively concluded that the 1973 letter was the result of a "decision" by the County that the 1971 deeds were invalid, and, because that "decision" went unchallenged for 180 days, it became final and binding. The court tentatively concluded that the conclusive presumption statute did not apply because the 1971 division of the parcel violated the "SITE AREA" provision, which the court tentatively concluded was a local ordinance controlling the division of land within the meaning of the conclusive presumption statute. The court directed the parties to submit briefs addressing the tentative decision.

After receiving this briefing, the court rejected the reasoning underlying its tentative ruling. "I am persuaded that there is a difference between a subdivision ordinance and a planning or zoning ordinance. Subdivision ordinances are authorized to be enacted by local entities pursuant to Government Code Section 66410, whereas planning and zoning ordinances are a different creature and are authorized under Government Code Section 65800 through 65912." The court viewed the only remaining

issue as whether the County had made a final decision in 1973 that the 1971 deeds were invalid. It delayed resolving that issue until it issued its statement of decision.

In November 2010, the court issued its statement of decision. It decided that the four parcels were "entitled to the conclusive presumption of lawful creation set forth in Government Code Section 66412.6, and County Code Section §14.01.109(a)3" because they had been created prior to January 21, 1972, and at a time when the County had no local ordinance "regulating the division of land creating fewer than five parcels." The court rejected the County's claim that the "SITE AREA" provision was a local ordinance within the meaning of section 66412.6, stating that this provision was a "zoning" regulation. The court further found that the County's failure to institute enforcement proceedings to establish the illegality of the 1971 parcel division left the parcels in "legal 'limbo'" and meant that they were entitled to the conclusive presumption. The petition was granted, and the County was ordered to issue four UCOC's. The court entered judgment in January 2011.

Heather Point filed a motion seeking attorney's fees under Code of Civil Procedure section 1021.5. The court denied the motion. It found that "there is inadequate evidence of a benefit to the public at large and that there has been an economic benefit to the Petitioners as a result of the litigation which was personal to them, and I think it's appropriate that they bear their own attorneys' fees." "[T]here's a financial benefit from the outcome of the litigation given that one parcel of property is now potentially capable of being divided into four separate sellable [*sic*] parcels, which will result in substantial economic benefit to the Petitioners."

The County and the interveners timely filed notices of appeal from the judgment. Heather Point filed a notice of cross-appeal from the judgment and from the court's order denying its motion for attorney's fees.

IV. The Appeal

A. Standard of Review

The parties engage in a lively debate about whether Heather Point's petition should have been treated as an action for traditional mandate or as an action for administrative mandate. The petition alternatively sought either traditional mandate or administrative mandate. In the trial court, Heather Point argued that its action was for "ordinary mandate" rather than for administrative mandate. The trial court stated that the standard of judicial review was substantial evidence. Later, the court said that it would be proceeding under Code of Civil Procedure section 1094.5, the administrative mandate statute. Still later, the court said: "[M]y ruling in this case is going to be guided by the court's statutory interpretation, the statutory construction, with respect to, first of all, whether the 1966 ordinance, 13.04.300(d)(2), whether it is in fact just a zoning ordinance, as opposed to an ordinance or a -- a local ordinance governing the division of land, . . . and again, that issue is . . . a pure legal analysis for the court."

Heather Point points out that an action for administrative mandate is available only where "a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts" is vested in the lower tribunal. (Code Civ. Proc., § 1094.5, subd. (a).) An action for traditional mandate, on the other hand, is available where the lower tribunal had a *ministerial* duty that it failed to perform. (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 232-233.)

Heather Point's entitlement to UCOC's depended on whether each of its parcels "is conclusively presumed to be lawfully created, pursuant to Government Code Section 66412.6," was "created by a minor land division" in which "[f]ewer than five parcels were created at the time of creation of the parcel in question," and "was created on or before January 21, 1972." (Santa Cruz County Code, § 14.01.109, subd. (A)(3)(a).) A UCOC is a "Level III" permit. (Santa Cruz County Code, § 14.01.115.) A Level III permit is acted upon by the planning director or his or her designee without a hearing.

(Santa Cruz County Code, § 18.10.112, subd. (A)(3).) A Level III permit approval or denial may be appealed to the planning director, but there is no right to a hearing on an appeal to the planning director. (Santa Cruz County Code, §§ 18.10.131, subd. (A), 18.10.320.) However, where, as here, a matter is granted "special consideration" by the Board, a public hearing is required, and testimony must be taken. (Santa Cruz County Code, § 18.10.350.) To the extent that there are any disputed facts, the Board, which hears the matter "de novo," has "discretion" in determining the facts. Although there were no significant factual disputes in this matter, that did not mean that the Board lacked the discretion to determine the facts. Hence, we conclude that the trial court properly considered Heather Point's petition as an action for administrative mandate under Code of Civil Procedure section 1094.5.

A number of cases have unreservedly concluded that administrative mandate is the appropriate action where UCOC's have been denied. "'[A] local agency's decision to deny certificates of compliance is reviewable by petition for writ of administrative mandate. [Citation.] The question for the trial court and for us on appeal is the same: whether the local agency's decision is supported by substantial evidence. [Citation.] The burden is on appellant to show there is no substantial evidence to support the decision. [Citation.]' (*Fishback v. County of Ventura* (2005) 133 Cal.App.4th 896, 901-902, 35 Cal.Rptr.3d 199 (*Fishback*).) However, here as in *Fishback*, 'there is little or no dispute about the evidence. Instead, the focus of the dispute is on the meaning of statutes. Statutory construction is a question of law which requires the exercise of our independent judgment.' [Citation.]" (*Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42, 46; see also *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970.) The same is true here. The merits of this dispute, as the trial court aptly acknowledged, are purely legal and depend on the meaning of statutes and ordinances. Hence, we exercise independent review.

"We apply well-settled principles of statutory construction. Our task is to discern the Legislature's intent. The statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.)

"'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation]; 'a construction making some words surplusage is to be avoided.' [Citation.] 'When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.' [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.)

B. The Board's Jurisdiction

Heather Point contends that the County was required to issue four UCOC's as the planning director had decided because the Board lacked the power to review the planning director's "final" decision.

Santa Cruz County Code section 18.10.350 provides the basis for the Board's "special consideration" of "[v]arious planning decisions." "Various planning decisions have been delegated to the Planning Commission, the Zoning Administrator, *the Planning Director, or other officers, subject to appeal procedures.* In order to ensure the

orderly and consistent application of this chapter in accordance with its intent, it is hereby provided that the Board of Supervisors shall consider and act *on any such delegated matter which would otherwise be appealable*, upon the request of any member of the Board of Supervisors, provided such a request, outlining the reasons why a special consideration of the matter is appropriate, is filed in writing with the Clerk of the Board within the time provided for filing an appeal." (Santa Cruz County Code, § 18.10.350, italics added.)

The initial decision on Heather Point's application was delegated to the planning director or his or her designee. (Santa Cruz County Code, § 18.10.112, subd. (A)(3).) *That* decision was subject to an appeal to the planning director. (Santa Cruz County Code, §§ 18.10.131, subd. (A), 18.10.320.) Thus, the initial decision was a "delegated matter" that was "subject to appeal procedures."

Special consideration may be granted under Santa Cruz County Code section 18.10.350 to "any such delegated matter which would otherwise be appealable." Heather Point argues that the planning director's *decision on appeal* was "final" and therefore was not "otherwise . . . appealable." As additional support for this interpretation, Heather Point asserts that the request for special consideration must be filed "within the time provided for filing an appeal," which is only possible where the decision granted special consideration remained appealable at the time of the request. As the request for special consideration will necessarily be filed *after* the planning director's *decision on appeal*, and there was no time provided for filing an appeal from that decision, Heather Point maintains that Santa Cruz County Code section 18.10.350 applies only to decisions that have not exhausted the appellate process.

Ordinances are construed in the same manner as statutes. (*Da Vinci Group v. San Francisco Residential Rent etc. Bd.* (1992) 5 Cal.App.4th 24, 28.) Although Heather Point's construction of Santa Cruz County Code section 18.10.350 is a plausible parsing of the words upon which it focuses, it is not a reasonable construction of the ordinance as

a whole. Heather Point's construction would not serve the express purpose of the ordinance. The purpose of this ordinance is "to ensure the orderly and consistent application" of the County's planning ordinances in decisions by "the Planning Commission, the Zoning Administrator, *the Planning Director, or other officers*." (Italics added.) Title 18 of the Santa Cruz County Code provides for seven levels of decisions. Level I through IV decisions, which include decisions on UCOC's, are the only ones made by the planning director. Level V decisions are made by the zoning administrator. Level VI decisions are made by the planning commission. Level VII decisions are made by the Board. (Santa Cruz County Code, § 18.10.112.) The planning director does not make any Level V, VI, or VII decisions, and the planning director's Level I, II, III, and IV decisions are not appealable beyond the planning director. (Santa Cruz County Code, § 18.10.320.) If Heather Point's construction were correct, none of the planning director's decisions would ever be subject to "special consideration" because there is no provision for *further* appeal of any decision by the planning director. Since the ordinance expressly states that it applies to decisions by the planning director, we cannot accept Heather Point's claim that the statute applies only to decisions that remain appealable after the planning director's decision.

Nor can it be argued that Santa Cruz County Code section 18.10.350 was intended to apply only to decisions that had not yet been appealed to the planning director. It is inconceivable that the Board would want to grant special consideration of an interim decision before the exhaustion of the appellate process that it had so carefully crafted. It is far more reasonable to conclude that the Board wished to exercise its power to grant special consideration only *after a final decision had been made* since it would be only at that point that the Board could determine whether that decision was inconsistent with other decisions. Indeed, as was the case here, the decision on appeal may be the opposite of the initial decision. There is no merit to Heather Point's focus on Santa Cruz County Code section 18.10.350's requirement that the request be filed "within the time provided

for filing an appeal." While Heather Point believes that this could be referring only to a further appeal in the appellate process, it is equally reasonable to view this as a general reference to the 14-calendar-day period that is provided for filing appeals from initial decisions. (Santa Cruz County Code, §§ 18.10.320, subd. (A), 18.10.324, 18.10.330, subd. (A), 18.10.340, subd. (A).)

We reject Heather Point's claim and find that the Board had jurisdiction to grant special consideration of the planning director's decision on Heather Point's application. We therefore proceed to the merits of the appeal.

C. Application of Conclusive Presumption Statute

Appellants contend that the conclusive presumption statute did not apply because (1) the parcels were illegally created, (2) the "SITE AREA" provision of the County's zoning ordinance qualified as a "local ordinance" regulating subdivisions within the meaning of the conclusive presumption statute, and (3) Heather Point was required to obtain a coastal development permit.

The conclusive presumption statute provides that "any parcel created prior to March 4, 1972, shall be conclusively presumed to have been lawfully created if the parcel resulted from a division of land in which fewer than five parcels were created and if at the time of the creation of the parcel, there was no local ordinance in effect which regulated divisions of land creating fewer than five parcels." (§ 66412.6, subd. (a).) "'Local ordinance' refers to a local ordinance regulating the design and improvement of subdivisions, enacted by the legislative body of any local agency *under the provisions of this division or any prior statute*, regulating the design and improvements of

subdivisions, insofar as the provisions of the ordinance are consistent with and not in conflict with the provisions of this division."[7] (§ 66421, italics added.)

Appellants' claim that the parcels were illegally created depends on their argument that the parcels were created in violation of the "SITE AREA" provision of the County's zoning ordinance. The flaw in this argument is that the conclusive presumption statute applies regardless of whether the creation of the parcels violated a provision of the County's zoning ordinance. The only requirements set forth in section 66412.6, subdivision (a) for application of the conclusive presumption are: (1) the parcel was created prior to March 4, 1972; (2) the parcel was created by a division of land into fewer than five parcels; and (3) no "local ordinance" within the meaning of the conclusive presumption statute was then in effect regulating divisions of land into fewer than five parcels. It is undisputed that these four parcels met the first two requirements. They were created in December 1971 by a division of land into four parcels. The only question is whether the third requirement was satisfied: was a "local ordinance" within the meaning of the conclusive presumption statute regulating the division of land into fewer than five parcels in effect in December 1971?

The "SITE AREA" provision upon which appellants rely was contained in former chapter 13.04 of the Santa Cruz County Code, a chapter entitled "The Zoning Ordinance of the County of Santa Cruz." (Santa Cruz County Code, former § 13.04.400.) Former Santa Cruz County Code section 13.04.300 provided that the zoning regulations in chapter 13.04 "shall be subject to the following general provisions and exceptions contained in Sections 13.04.300-A through Section 13.04.300-P." Former Santa Cruz County Code section 13.04.300-d, enacted in 1966, was one of those "general provisions and exceptions." It was entitled: "SITE AREA, SITE WIDTH, SITE DEPTH, SITE

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[7] This definition of "local ordinance" preexisted the enactment of the conclusive presumption statute. (Stats. 1974, ch. 1536, § 4.)

FRONTAGE AND SITE COVERAGE" and had seven subsections. The first subsection provided: "The use of land as permitted for the district in which it is located shall be permitted on a building site of less area, width, depth or frontage than that required by the regulations for such district providing such was a separate lot or parcel of record or as shown on a map of a recorded subdivision on the effective date of this Chapter."

The second subsection, which is the one upon which appellants rely, provided: "Where buildings or structures have been erected prior or subsequent to the effective date of this Chapter, the area on which such buildings or structures are erected shall not be subsequently divided so as to reduce the building site area[,[8]] width, depth or frontage below the requirements of this Chapter for the type and zone location of the buildings or structures." (Santa Cruz County Code, former § 13.04.300-d.) Former Santa Cruz County Code chapter 13.04 defined the terms of art that it used. "Site" was defined as "A parcel of land, subdivided or unsubdivided, occupied or to be occupied by a use or structure." "Site Area" was defined as "The total horizontal area included within the property lines of a site . . . ." "Site Width" was defined as "The horizontal distance between the side property lines of a site measured on an alignment parallel to the front property line along the rear line of the required front yard." (Santa Cruz County Code, former § 13.04.110 S.)

Appellants insist that the "SITE AREA" provision was a "local ordinance" within the meaning of the conclusive presumption statute. If the Legislature had not very carefully defined what it meant by the term "local ordinance" in section 66412.6, subdivision (a), we might agree with appellants. After all, the "SITE AREA" provision

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[8] A comma is missing here, but it seems likely that one was intended. The other subsections use a comma when they refer to a site's "area, width, depth" "[S]ite area width" is not a term of art in this chapter, while site area and site width are. Hence, we decline to find the absence of a comma here to mean that the ordinance was not intended to refer to "site area."

does bar an "area" from being "divided." However, the Legislature explicitly provided that the only type of local ordinance that would prevent the application of the conclusive presumption would be one "*enacted . . . under the provisions of this division or any prior statute*, regulating the design and improvements of subdivisions . . . ." (§ 66421, italics added.) The "SITE AREA" provision does not come within this definition.

Section 66421 is in division 2 of title 7 of the Government Code. Division 2, which was created in 1974, is the Subdivision Map Act (the SMA). (§ 66410; Stats. 1974, ch. 1536.) The "prior statute, regulating the design and improvement of subdivisions," which was in effect when the "SITE AREA" provision was enacted in 1966, was the 1943 version of the SMA, which was then located in the Business and Professions Code. (Bus. & Prof. Code, former § 11500 et seq.; Stats. 1943, ch. 128, § 1.) Neither the 1974 SMA nor the 1943 SMA authorized the enactment of *zoning regulations* such as the "SITE AREA" provision. The "SITE AREA" provision, which was plainly part of the County's "Zoning Ordinance," was not enacted "under the provisions of" the SMA. Counties are authorized to enact zoning ordinances under section 65800, which is now in *Division 1* of Title 7, the Planning and Zoning Act, and which prior to 1974 was simply Title 7. (§§ 65000, 65800 [providing for the adoption of zoning ordinances by counties]; Stats. 1974, ch. 1536, § 3; Stats. 1965, ch. 1880, p. 4346 [enacting § 65800, providing for the adoption of zoning ordinances by counties].)

Appellants contend that the "SITE AREA" provision was not precluded from qualifying as a "local ordinance" under the conclusive presumption statute merely because it was part of the County's zoning ordinance. Even if this were true, however, it was not just the placement of this provision in the County's zoning ordinance but the nature of the provision itself that compels the conclusion that the "SITE AREA" provision is not a "local ordinance" within the meaning of the conclusive presumption statute. The "SITE AREA" provision did not purport to govern the *creation* of parcels; its provisions were aimed at the *use* of a parcel. Indeed, it did not even apply to a parcel

that was not occupied by a structure. The cases upon which appellants rely do not support their claim that this provision of the County's zoning ordinance qualified as a "local ordinance" within the meaning of the conclusive presumption statute. None of those cases even addressed whether a provision of a zoning ordinance could qualify as a "local ordinance" under the conclusive presumption statute. "[C]ases are not authority for propositions not considered." (*McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38.)

Appellants do not contend that any other section of the Santa Cruz County Code that was in effect in December 1971 might qualify as a "local ordinance" under section 66412.6. Since no "local ordinance" existed in December 1971, Heather Point's parcels satisfied all three requirements for application of the conclusive presumption.

Appellants claim that section 66412.6 should not be applied because it was not *intended* to make "lawful" an "unlawful division of land." They attempt to support this proposition by relying on a single document in a legislative history that was presented to the trial court.[9] This one-page document was identified as having been found "in the file of the *League of California Cities*." (Italics added.) There is no indication that the *Legislature* ever saw or considered, let alone endorsed, the statements in this document. (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 487 ["In the absence of any evidence that the [document] was considered by the legislators, it is not a proper indicator of legislative intent."].) In any case, the plain language of

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[9] Appellants also rely on dicta in *Fishback* that might seem to support this proposition. "Section 66412.6, subdivision (a), simply clarifies that parcels legally created without a parcel map are legal even after the parcel map requirement was added to the SMA. The statute does not legalize illegally created parcels." (*Fishback, supra,* 133 Cal.App.4th at p. 904.) The *Fishback* court cited no support for this statement, which was irrelevant to its holding, and we attach no import to it. We note that it would make little sense to create a conclusive presumption of legality that would apply only to parcels that were lawfully created.

section 66412.6 is unambiguous, so there is no need to consult the legislative history. (*Wells v. One2One Learning Foundation*, *supra*, 39 Cal.4th at p. 1190.) "Only when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning." (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055.)

Appellants also contend that the 1973 letter established that the County had made a binding decision that the parcels were unlawfully created, and, due to the then-owners' failure to challenge that decision, the parcels must be considered illegally created. The County's parcel legality ordinances do not preclude a parcel from qualifying for a UCOC under the conclusive presumption due to a zoning ordinance violation. Like section 66412.6, Santa Cruz County Code section 14.01.109, subdivision (A)(3) provides that a parcel is "conclusively presumed to be lawfully created" if it was created by a subdivision of fewer than five parcels before January 21, 1972.[10] It imposes no requirement that the parcels be in compliance with zoning ordinances.

Appellants claim that the 1973 letter was the culmination of a County procedure to "enforce" a "decision" that the 1971 subdivision was illegal. While the 1973 letter may reflect an internal County determination that the 1971 subdivision was illegal, appellants fail to explain why such an internal determination should have any impact on the parcels' eligibility for application of the conclusive presumption. This is not a situation where the

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[10] The County asserts in its opening brief that a UCOC cannot be obtained unless the parcel complied with zoning restrictions at the time it was created. Not so. The County's parcel legality ordinances provide several alternative methods of qualifying for a UCOC. Section 14.01.109, subdivision (A)(3) concerns the conclusive presumption. Section 14.01.109, subdivision (A)(1)(c), which the County quotes and miscites as "14.01.109(a)(3)," contains additional requirements because it does not involve the conclusive presumption and applies to subdivisions of five *or more* parcels. (Santa Cruz County Code, § 14.01.109, subd. (A)(1).)

legality of the creation of the parcels had been previously litigated so as to create an estoppel of some kind. Yet appellants claim that the County's 1973 letter establishes that the 1971 subdivision was illegal because the then-owners of the parcels "took affirmative steps to . . . comply with County Counsel's directive." The record does not support this claim. The 1973 letter stated the County would not "give[] legal recognition" to the parcels and "suggested that" the then-owners "recombine" the four parcels "into the original parcel as it existed prior to December 20, 1971." A "suggestion" is not a "directive." The then-owners never "recombine[d]" the parcels. Their 1978 deed to BAT transferred four separate parcels; it did not "recombine" them into one parcel. And the County never took any action to enforce its belief that the four parcels were not lawfully created. Under these circumstances, we can see no basis for any type of estoppel or other legal impediment to application of the conclusive presumption.

The final contention made by appellants is that the parcels were ineligible for UCOC's because a coastal development permit was required. They rely on Public Resources Code section 30106. That statute provides that, under the Coastal Act, "[d]evelopment" includes a "division of land." (Pub. Resources Code, § 30106.) The issuance of the UCOC's for these four parcels did not divide any land or grant any other "[d]evelopment" rights. These parcels were created by a division of land in 1971, before the Coastal Act existed. Appellants provide no support for their claim that the bare issuance of a UCOC requires a coastal development permit.

V. The Cross-Appeal

Heather Point raises four issues in its cross-appeal. It claims that the trial court erred in (1) granting the motion to intervene, (2) denying the motion to disqualify Wittwer and his law firm from representing the interveners, (3) denying the motion to augment the record, and (4) denying Heather Point's motion for attorney's fees. The first three issues are moot, as Heather Point prevailed on the merits in the trial court, we

affirm the court's ruling, and we therefore could not grant any meaningful relief as to these three pretrial issues. We proceed to the attorney's fees issue.

Code of Civil Procedure section 1021.5 provides: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." (Code Civ. Proc., § 1021.5.) "The burden is on the claimant to establish each prerequisite to an award of attorney fees under section 1021.5." (*Ebbetts Pass Forest Watch v. Deptartment of Forestry & Fire Protection* (2010) 187 Cal.App.4th 376, 381.)

"'On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.'" (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

Heather Point contends that we should exercise independent review. This is not a case involving statutory construction. The trial court's denial of the motion was based on its findings that Heather Point, the claimant, had failed to satisfy its burden of establishing the statutory factors. The court found that Heather Point had not presented adequate evidence that there was a significant benefit to the public. This is known as the public benefit factor. The trial court also concluded that Heather Point had failed to show that it would be inappropriate for it to bear the financial burden of paying its own attorney's fees given that Heather Point had reaped a substantial "personal" "economic benefit" from the litigation. This is known as the financial burden factor. The decision

as to whether Heather Point had met its burden of satisfying these two statutory factors does not require statutory construction but merely application of the law to the facts.

In its reply brief, Heather Point argues that de novo review is required because the trial court "failed to apply . . . the proper method of balancing costs and benefits in determining" the financial burden factor had not been satisfied. "The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment. [Citation.] The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error." (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.) Heather Point fails to direct our attention to any indication in the record that the trial court applied an improper standard in evaluating Heather Point's showing on the financial burden factor. The trial court's order provided no explanation of its ruling, and the court's statements at the hearing were not inconsistent with application of the appropriate standard.

We therefore apply the abuse of discretion standard of review. "The decision whether to award attorney fees pursuant to [section 1021.5] lies within the discretion of the trial court and will not be disturbed on appeal absent a prejudicial abuse of discretion resulting in a manifest miscarriage of justice." (*Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1125 (*Galante*).)

The primary basis for the trial court's decision to deny the motion was Heather Point's failure to establish the financial burden factor. "The second prong of the inquiry addresses the 'financial burden of private enforcement.' In determining the financial burden on litigants, courts have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. '"An award on the 'private attorney general' theory is

appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' [Citation.]"' [Citation.] 'This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit.' [Citation.] [¶] . . . [¶] 'After approximating the estimated value of the case at the time the vital litigation decisions were being made, the court must then turn to the costs of the litigation—the legal fees, deposition costs, expert witness fees, etc., which may have been required to bring the case to fruition. . . . [¶] The final step is to place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case. . . . [A] bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs.'" (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215-1216.) While it is true that "[a] pecuniary interest in the outcome of the litigation is not disqualifying[,] . . . 'the issue [before the trial court] is whether the financial burden placed on the party is out of proportion to its personal stake in the lawsuit.'" (*Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1352.)

One of Heather Point's trial attorneys declared that she had spent 76.95 hours representing Heather Point in the administrative proceedings and 346.6 hours prosecuting the writ. Another of Heather Point's trial attorneys declared that he and his colleagues had "billed" a total of $475,828.75 "in connection with the [writ] proceeding."[11] Heather Point's principal declared that obtaining the UCOC's "probably" increased the value of the parcels, but "not materially" because it did not give Heather Point any development

[11] It was not clear whether these "billings" included the administrative proceedings or were limited to the writ proceeding.

rights. The County submitted evidence that, by obtaining UCOC's, Heather Point had increased the value of its parcels by around $2 million.[12]

The evidence before the trial court supports its finding that Heather Point had failed to establish the financial burden factor. Since the trial court could have found that the expected value of the litigation to Heather Point was close to $2 million, it could have concluded that this value exceeded by a substantial margin (nearly four times) the actual litigation costs (around $500,000). On this basis, the trial court could have reasonably concluded that it was not necessary to offer a "bounty" to Heather Point to encourage it to pursue this litigation.[13]

Heather Point claims that it gained nothing from this action because, even before this action, it "had four lots and the ***right*** to four UCOCs . . . ." (Original bold & italics.) This is untrue. At the commencement of the writ proceedings, the final administrative decision had established that Heather Point was *not* entitled to *four* UCOC's but to just *one* UCOC. It was the writ proceedings that *established* Heather Point's "right" to four UCOC's and the heightened value associated therewith.

The trial court did not abuse its discretion in denying Heather Point's attorney's fees motion.

VI. Disposition

The trial court's orders are affirmed.

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[12] Heather Point tries to discredit this evidence on appeal, but the trial court was entitled to credit it.

[13] Because Heather Point's failure to establish the financial burden factor made it ineligible to recover its fees, we need not address the trial court's finding that it also failed to establish the public benefit factor.

_____
Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

_____
Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.